THE MODEL PENAL CODE AND BEYOND

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I had better start by making my bias clear: The Model Penal Code is a superb achievement. As a contribution to legal scholarship in our time it has few if any equals. And in one respect it is unrivaled. No treatise (for that is what the Code is) has so advanced thought about its subject, not even Wigmore's. The reporters and their associates have restored intellectual respectability to the substantive criminal law, in general and in detail. I am tempted to say in general and therefore in detail, since in my view it is the analytic strength of part I, the "General Provisions," and in particular of the "General Principles of Liability" stated in article 2, that made possible much of the creative innovation of the work on particular crimes.

In this brief comment of appreciation, I want first to consider the Code's genius, to use that word in its old-fashioned sense. For that purpose, I shall confine myself mainly to instances drawn from the "General Provisions," a limitation that seems especially appropriate to a Symposium sponsored by the home institution of the Chief Reporter. The other issue that I want to touch on briefly is one that naturally occurs when a piece of work is viewed, as I view the Code, as a major step forward. What is there left to do? What role ought we to expect scholarship in the substantive criminal law to play in the future? Is it to be subordinate and interstitial, or do central tasks remain?

I.

For me, the dominant tone of the Code is one of principled pragmatism. Perhaps the adjective and the noun should be reversed, because fidelity to principle is the solid base on which the Code is built. But its provisions reflect an awareness that the discernment of right principles is only the beginning of rational lawmaking and that the besetting sin of rationality is the temptation to press a principle to the outer limits of its logic. The Code avoids that sin; its spirit is one of accommodation, by which I do not mean the spirit of the horse-trade or of that politics which is defined as the art of the possible. Rather, I mean the kind of accommodation to existing institutions that results from the perception that in law one does not write on a clean slate. Examples both great and small can be adduced. I shall confine myself to four instances, all of them bearing on the problems of the mental element in criminal law.

The most important aspect of the Code is its affirmation of the centrality of *mens rea*, an affirmation that is brilliantly supported by its careful articulation of the elements of liability and of the various modes of culpability to

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which attention must be paid in framing the definitions of the various criminal offenses.[1] I shall not deal here with the question, discussed elsewhere in this Symposium,[2] whether the inclusion of negligence as a mode of culpability is a departure from the values symbolized by the *mens rea* concept.[3] I want rather to discuss the provisions that deal with the complicated problem of absolute liability in the criminal law.[4]

It is easy enough to reach the conclusion that absolute liability has no place in a scheme of law that rests inescapably upon condemnation of the prohibited conduct. The Code's trenchant Comments say all that needs to be said on that score.[5] For some, that is not only the beginning of wisdom but also its end. The machinery of criminal justice should have no concern, they say, with conduct unaccompanied by culpability. But a vast number of crimes have been construed by the courts (mainly, it is true, without express legislative recognition of the problem) to dispense with any mental element, or, to use the Code's term, any requirement of culpability. What is to be done about these unlovely products of judicial obscurantism? I suppose that it would have been possible, and some critics of the Code contend that it would have been desirable, to opt for excision of such offenses from the criminal law. But proclaiming the demise of absolute liability does not bring it about. The help that the Lord gave to Joshua is not available to an army of scholars, even when they advance under the banners of the American Law Institute. The Code takes a more modest stand. It permits the imposition of absolute liability,[6] recognizing that enactment of the Code in its principal features will not displace the host of particular criminal enactments outside its scope, but it forbids both the designation of the offense as a "crime" for any legally relevant purpose and the imposition of an absolute or conditional sentence of imprisonment.[7] At the same time, it affords a basis for integrating these offenses into the main body of the criminal law by providing that they may be treated as "crimes" in any case in which the actor's culpability is proven.[8]

It is difficult to see why this solution should offend anyone who is not prepared to assert that absolute liability is indefensible civilly as well as criminally. The fact is that the processes of criminal justice are employed to deal with offenses that no one would think of as "criminal" apart from their

1. MODEL PENAL CODE § 2.02 (Off. Draft 1962). The Model Penal Code is hereinafter cited as MPC. Unless otherwise indicated, all citations are to the 1962 Official Draft. See MPC § 2.02, comments 1 & 2 (Tent. Draft No. 4, 1955); *cf.* MPC §§ 1.13(9), (10).

2. Hall, *Negligent Behavior Should Be Excluded From Penal Liability*, 63 COLUM. L. REV. 632 (1963).

3. I have expressed my views on that question elsewhere. Packer, *Mens Rea and the Supreme Court*, in 1962 SUPREME COURT REVIEW 107, 143-45 (Kurland ed.).

4. MPC §§ 1.04(5), 2.05, 6.02(4).

5. See MPC § 2.05, comment 1 (Tent. Draft No. 4, 1955).

6. MPC § 2.05(2)(a).

7. MPC § 1.04(5).

8. MPC § 2.05(2)(b).

being dealt with in courts of criminal jurisdiction in accordance with procedures that in their outward forms reflect the usages of the criminal law. Witness minor traffic offenses. Witness the host of minor sumptuary or regulatory offenses. It seems both quixotic and presumptuous to say to the legislature: "In order to preserve the doctrinal purity of the criminal law, you must either allow defendants in such cases to litigate the issue of their culpability or provide another set of institutions to deal with them." The real issue is not the form of the litigation but its consequences. The Code does not require adherence to form for its own sake; it takes the more difficult route of examining the consequences and forbidding those incompatible with the absence of *mens rea.*

Consider the famous *Dotterweich* case,[9] in which the criminal provisions of the Federal Food, Drug, and Cosmetic Act were construed to impose absolute as well as vicarious liability on the president of a wholesale drug supply firm that sold drugs technically "misbranded" under the act. Despite the absence of proof that Dotterweich knew or in the exercise of due care should have known that the drugs were misbranded, a sentence that included the distinctively criminal sanction of probation[10] was upheld. Under the Code formulation, if the jury had found under adequate instructions that Dotterweich had been at least negligent in failing to ascertain the quality of what he sold, he could have been dealt with as a criminal; otherwise, not. Only a zealot could ask more. The principle at stake is fully preserved but existing institutional arrangements are not disrupted.

The provisions involving what has conventionally been referred to as "mistake of fact" are simply corollary to the *mens rea* provisions, as the Code Comments recognize.[11] If ignorance or mistake negates the existence of a required mode of culpability, the offense is not proven. Analytically, these mistakes include mistakes about law other than the law defining the offense in question. Thus, in bigamy, mistake about the legal effect of a divorce should exculpate just as in larceny a mistake about one's property rights is commonly held to exculpate. The mistake negates the required culpability. All of this the Code makes clear. The problem of genuine ignorance or mistake of law—in the sense of the criminality of the conduct in question—is a much harder one. As Professor Jerome Hall has demonstrated, the doctrine that denies legal effect to ignorance that the conduct with which one is charged has been authoritatively defined as criminal is part and parcel of the principle of legality.[12] Just as a judgment of criminality cannot be imposed unless the conduct in question has been defined as criminal, so, once the conduct has

9. United States v. Dotterweich, 320 U.S. 277 (1943).
10. See United States v. Buffalo Pharmacal Co., 131 F.2d 500 (2d Cir. 1942), *rev'd sub nom.* United States v. Dotterweich, *supra* note 9.
11. See MPC § 2.04, comment 1 (Tent. Draft No. 4, 1955).
12. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 382-87 (2d ed. 1960).

been so defined, one cannot usurp the lawmaking function by pleading that his ignorance must mean that the conduct is not criminal as to him. That doctrine is just, so long as the behavior content of the criminal law is coterminous with the knowledge that a member of the community may be expected to have about the limits of tolerable behavior. But, in fact, the criminal law has been indiscriminately employed to proscribe conduct that does not carry its own warning of illegality. Absent that kind of warning, a first offender may lack the only kind of culpability with which he may justly be charged. Nonetheless, he has no defense under prevailing law. Therein resides a major dilemma.

The Code's approach to the problem is a cautious one. In the main, the conventional position is affirmed.[13] But a limited defense is provided in two situations in which the defendant has a reasonable "belief that conduct does not legally constitute an offense . . . ."[14] One set of situations, reached by some existing decisions, involves "reliance upon an official statement of the law, afterward determined to be invalid or erroneous," including the increasingly important case of reliance on an official interpretation.[15] Another situation may break new ground, although its scope is uncertain. Section 2.04 (3)(a) provides the defense when:

> the statute or other enactment defining the offense is not known to the actor and has not been published or otherwise reasonably made available to him prior to the conduct alleged.

The crucial question here is whether "published" means simply officially announced, without regard to the effectiveness of the communication, or whether it means made known in such a way that it can be said to have been "reasonably made available to" the actor. To put it another way, is the defense made out if the actor proves that, given his situation, he was not negligent in failing to ascertain what the law required? In view of the candor with which the Code's accompanying Comments typically treat difficult issues, I assume that its silence on this one is inadvertent, for the provision itself is certainly ambiguous. I hope that what is intended is in substance the provision of a negligence standard with respect to mistake of law due to nonavailability of the enactment and that negligence is not made out simply by showing publication, however obscure. If that is what is intended, it would be well for the final version of the Code to make it clear, either in the provision itself or by appropriate commentary. Assuming that the provision means what I think it should, it seems to me that it does as much as can be done to resolve the dilemma of *ignorantia legis*. Given the novelty of the solution and its potentially wide range of application, objection can scarcely be made to

13. MPC § 2.02(9).
14. MPC § 2.04(3).
15. MPC § 2.04(3)(b).

putting on the defendant, as the Code does, the burden of showing by a preponderance of the evidence that his ignorance or mistake was reasonable.[16] This is only one of several instances exhibited in the Code of the wise use of a procedural device to assist in the resolution of a difficult substantive problem.

The two problems just examined are so fundamental that their resolution shapes decisively the character of the entire substantive criminal law. I have attempted to suggest that their resolution in the Code is far superior to what would have emerged from a rigid adherence to theory for its own sake, on the one hand, or from an attempt to preserve the irrationality of existing law, on the other. It should not be thought, however, that the spirit of principled pragmatism inheres only in formulations at the highest level of generality. The resolution of the felony-murder problem is an illustration of how the genius of the Code operates at the level of specific rules through a wise accommodation of conflicting claims.

In its essence, the problem is whether and to what extent the occurrence of a homicide in the commission of a crime involving danger to life should itself be deemed to supply the requisite culpability as to the homicidal result, without the conventional proof that the actor desired or foresaw that result. In its most extreme version, existing law holds the actor liable merely on proof that the homicide occurred in the commission of a felony (typically armed robbery). In form, this means that absolute liability for murder is being imposed. In substance, however, the felony-murder rule simply relieves the jury of having to infer what can usually be inferred with great ease, that the actor foresaw that death might result from his conduct. The irrationality of the rule, which has long drawn the attack of scholars, lies in the result that it compels in the rare case in which the evidence shows the absence of culpable foresight. It is this *automatic* and *conclusive* imputation of culpability that has been rightly criticized.

The conventionally proposed solution has been to abolish the rule. That is the effect of Section 1 of the English Homicide Act of 1957.[17] In my view, that solution, while greatly preferable to the injustice of the rule in its classic severity, goes further than is necessary to achieve its object and, in so doing, ignores a valuable insight drawn from common experience. To elucidate the point, it is necessary to consider the normal culpability requirements for murder. Although some authority is contrary, it is usually held that murder requires an intention to bring about the homicidal result or, at the least, extreme indifference to the risk of human life inherent in the actor's conduct. That is the position reflected in the Code.[18] As a matter of proof, the conclusion that the actor manifested extreme indifference to homicidal risk ordinarily

16. See MPC § 2.04(4).
17. 5 & 6 Eliz. 2, c. 11.
18. See MPC § 210.2. See also MPC § 201.2, comments (Tent. Draft No. 9, 1959).

must be inferred from an appraisal of the circumstances under which he acted. In the usual felony-murder situation, that inference could be drawn from proof that the actor perpetrated an armed robbery during which he shot and killed his victim.

The Code proposes an ingenious solution to the problem. In effect, it subjects felony-murder to the same culpability requirement as ordinary murder, but creates a presumption of extreme recklessness when the actor is engaged, by himself or with others, in the perpetration of certain named felonies.[19] The procedural effect of the presumption is that if the jury finds that the defendant was engaged in a felony, they are free to regard that as sufficient evidence of the recklessness "manifesting extreme indifference to the value of human life" that under the Code is the minimal culpability requirement for murder.[20] However, the jury need not so regard it and presumably would not in a case in which the evidence demonstrated that the homicide was accidental. In short, the felony-murder rule is transformed from a rule of law to a rule of evidence. The principle of *mens rea*, as it applies in the law of homicide, is fully preserved, but the jury's attention is explicitly directed to the justifiable evidentiary implication of homicide in the course of a felony.[21] It should also follow that prosecutors' reluctance to see the felony-murder rule done away with will be greatly diminished. While that factor does not justify acquiescence in the Code solution, it should be a desirable consequence of it, serving as it does to focus attention on the narrowness of the area of legitimate disagreement. Once again, the Code's framers have demonstrated that the recognition of principle is a necessary but not a sufficient condition of wise lawmaking.

The fourth instance I have chosen to discuss does not strike me as presenting an equally happy case of wise accommodation. The Code's handling of the significance of intoxication as an excusing condition leaves something to be desired. The Code takes the general position that an excusing condition that relates to the actor's awareness "ought to be accorded a significance coextensive with its relevance to disprove such awareness . . . ."[22] That position has to be taken if due regard is to be accorded the centrality of *mens rea*. The Code's treatment of intoxication as an excuse reaches that result, but only in part. Voluntary intoxication may be adduced to disprove purpose or knowledge,[23] a result that accords with the inartistically expressed holding under

19. See MPC § 210.2(1)(b).
20. MPC § 210.2(1)(b); see MPC § 1.12(5).
21. The analogous misdemeanor-manslaughter rule is abolished, because there is no basis in experience for a presumption of recklessness or negligence as to a homicidal result occurring in the commission of a misdemeanor. See MPC §§ 210.3, 210.4; MPC § 201.3, comment 1 (Tent. Draft No. 9, 1959).
22. MPC § 2.08, comment 3 at 8 (Tent. Draft No. 9, 1959). Compare MPC § 2.04, comment 2 (Tent. Draft No. 4, 1955).
23. MPC § 2.08(1).

existing law that intoxication negates "specific intent." Thus, evidence of intoxication is admissible to show that an actor charged with first degree murder did not possess the capacity to "premeditate" or "deliberate," thereby permitting, under the typical division of murder into degrees, the mitigation of what would otherwise be first degree murder to second degree murder. The crucial question is whether intoxication ought also to be admissible to disprove recklessness—conscious risk creation—thereby permitting murder to be mitigated to manslaughter or, perhaps, to a lesser offense. Prevailing law, at least in this country, does not permit evidence of intoxication to be adduced for that purpose, usually expressed by the confusing statement that intoxication does not disprove "general intent." The Code does not engage in word-mongering on this issue; it has at least the virtue of facing the problem squarely and articulating the considerations that are thought to justify the creation of a special rule for intoxication:

> We mention first the weight of the prevailing law which here, more clearly than in England, has tended towards a special rule for drunkenness. Beyond this, there is the fundamental point that awareness of the potential consequences of excessive drinking on the capacity of human beings to gauge the risks incident to their conduct is by now so dispersed in our culture that we believe it fair to postulate a general equivalence between the risks created by the conduct of the drunken actor and the risks created by his conduct in becoming drunk. Becoming so drunk as to destroy temporarily the actor's powers of perception and of judgment is conduct which plainly has no affirmative social value to counterbalance the potential danger. The actor's moral culpability lies in engaging in such conduct. Added to this are the impressive difficulties posed in litigating the foresight of any particular actor at the time when he imbibes and the relative rarity of cases where intoxication really does engender unawareness as distinguished from imprudence. These considerations lead us to propose, on balance, that the Code declare that unawareness of a risk of which the actor would have been aware had he been sober be declared immaterial.[24]

Leaving aside the justification based on existing law, which would have more weight in a restatement than it does in a model code, the rationale seems to come down to an evidentiary one: "Drunkenness usually does import recklessness and, anyhow, it creates difficulties of proof to allow the issue to be litigated." This rationale is not persuasive. If common experience does suggest the existence of a normal but not invariable relationship between drunkenness and recklessness, the appropriate solution seems to be to give special evidentiary weight to the fact of drunkenness as the basis for an inference of recklessness. In short, why not create a presumption of recklessness arising from intoxication, just as the Code creates a presumption of recklessness arising from participation in a felony in the felony-murder instance just

24. MPC § 2.08, comment 3 at 8-9 (Tent. Draft No. 9, 1959).

discussed? What seems to be called for is a rule of evidence, not a rule of substantive law. If this alternative was considered, the Code commentary does not explain why it was rejected. I should hope that the issue might be faced in the final version. The presumption device seems to afford the *via media* that has been so often and so fruitfully taken elsewhere in the Code.

I have so far said nothing explicit about draftsmanship. To do justice to its truly superlative quality would be quite impossible without rivaling the length of the Code commentary. Once again, I shall have to resort to a general statement about the Code's genius, and support it, however inadequately, with a couple of instances.

The characteristic spirit of the Code's draftsmanship inheres in its adoption of the "Aristotelian axiom" that "it is the mark of the educated man to seek precision in each class of things just so far as the nature of the subject admits."[25] When precision is possible, the Code is devastatingly precise. When precision is not possible, it is not sought, nor is there any pretense that it has been attempted. Two cases in point come to mind, from the host of examples that might be mentioned. The first one is to be found in the single most important provision of the Code, the one articulating the general *mens rea* requirements.[26] With analytic precision unrivaled by any other treatment of the subject of which I am aware, the Code sets forth four modes of culpability—purpose, knowledge, recklessness, and negligence—and identifies the characteristics of the material elements of the offense to which they are relevant—the nature of the forbidden conduct, the attendant circumstances, and the result of the conduct. It also recognizes that "material element" includes facts that negative a defense on the merits as well as facts included in the definition of the crime, thereby eliminating a major source of confusion, particularly in the law of homicide. It is no overstatement to assert that a lawmaker or law-applier armed with an understanding of these concepts can approach the problem of defining any specific offense or of applying such a definition to any given set of facts with analytic tools fully adequate to the task. Nor do I think it hyperbolic to suggest that this is the first treatise on the subject for which that claim may be made.[27]

So much for precision and its rewards. This very same provision of the Code exhibits a striking instance of the candid recognition that precision has its limits. In defining the modes of culpability, the Code recognizes a basic distinction between purpose and knowledge, on the one hand, and recklessness and negligence, on the other. The first two are self-executing; they require only definition. The second two, even after being defined, still require a standard to be announced for their application to specific cases. The Code defines

25. See KURLAND, RELIGION AND THE LAW 15 (1962).
26. MPC § 2.02.
27. See MPC § 2.02, comments (Tent. Draft No. 4, 1955).

recklessness with respect to a material element as the conscious disregard of a substantial and unjustifiable risk that the material element exists or will result from the actor's conduct.[28] But it remains to articulate a standard for judging when a risk is "substantial and unjustifiable." At this point, the Code commentary presents an admirable exposition of the limits of precision. It defies paraphrase, so tightly articulated is the argument. I shall yield to the temptation that I have suppressed through most of this paper and allow the Code to speak for itself:

> As we use the term, recklessness involves conscious risk creation. It resembles acting knowingly in that a state of awareness is involved but the awareness is of risk, that is of probability rather than certainty; the matter is contingent from the actor's point of view. Whether the risk relates to the nature of the actor's conduct or to the existence of the requisite attendant circumstances or to the result that may ensue is immaterial; the concept is the same. The draft requires, however, that the risk thus consciously disregarded by the actor be "substantial" and "unjustifiable"; even substantial risks may be created without recklessness when the actor seeks to serve a proper purpose, as when a surgeon performs an operation which he knows is very likely to be fatal but reasonably thinks the patient has no other, safer chance. Accordingly, to aid the ultimate determination, the draft points expressly to the factors to be weighed in judgment: the nature and degree of the risk disregarded by the actor, the nature and purpose of his conduct and the circumstances known to him in acting.
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> Some principle must be articulated, however, to indicate what final judgment is demanded after everything is weighed. *There is no way to state this value-judgment that does not beg the question in the last analysis; the point is that the jury must evaluate the conduct and determine whether it should be condemned.* The draft, therefore, proposes that this difficulty be accepted frankly and the jury asked if the defendant's conduct involved "culpability of high degree." The alternative suggested asks if it "involves a gross deviation from proper standards of conduct." This formulation is designed to avoid the difficulty inherent in defining culpability in terms of culpability, but the accomplishment seems hardly more than verbal; it does not really avoid the tautology or beg the question less. It may, however, be a better way to put the issue to a jury, especially as some of the conduct to which the section must apply may not involve great moral culpability, even when the defendant acted purposely or knowingly, as in the violation of some minor regulatory measure.[29]

The same regard for the limits of precision marks one of the Code's most striking analytic contributions, the solution of the "proximate causation" problem.[30] It would take a far more elaborate treatment than is possible in this context to do anything like justice to the intricacies of the solution, to

28. MPC § 2.02(2)(c).
29. MPC § 2.02, comment 3 at 125-26 (Tent. Draft No. 4, 1955). (Emphasis added.)
30. MPC § 2.03.

its major successes, or to its quite marginal shortcomings.[31] In its essence, it dissociates the question of factual causation (*sine qua non*) from the question whether the actor should be held liable for a result that his conduct in fact caused, even though the actual result differed in some respect from that which he desired or foresaw. Existing law deals with this problem through incoherent mumblings about "proximate cause" that serve more to identify than to explain the results reached in particular cases. The Code proposes what in most cases will be a three-step analysis. First, the question of factual causation is put. Typically, it will be answered in the affirmative; only rarely can it be said, for example, in the kind of homicide case that presents the typical "proximate cause" problem, that the actor did not in fact "cause" the homicidal result, in the sense that it would not have occurred but for his conduct. The victim of a shooting who died in the hospital from scarlet fever negligently communicated by the attending physician suffered a death that was, in this sense, caused by the shooting.[32] The real question is whether liability should attach, and this is a question not of causation but of culpability. And so the Code's second analytical step is to inquire whether the actor had the requisite culpability with respect to the result. In the case just put, if the charge is murder, and if it is shown that he did intend to kill, that requirement is satisfied. The third and final step of the analysis takes place only if the answers to the first two questions do not exculpate the actor. It is at this point that the enormous difficulties of the present proximate cause formulae appear. The Code resolves the problem by a departure from precision at the point when precision is no longer possible; it puts the matter to the jury's sense of justice by directing them to determine whether "the actual result . . . is not too remote or accidental in its occurrence to have a (just) bearing on the actor's liability or on the gravity of his offense."[33] Once again, as it seems to me, the Code exhibits the power of an analysis that recognizes the limits of precision. Not all questions can be answered in advance. When judgment must be exercised, it is enough to direct attention to the criteria that should govern.

Little that I have said is not patent from a reasonably attentive reading of the Code and its commentary. The tribute that its appearance deserves is not praise or even paraphrase, but the widespread attention of the profession. Everyone concerned with the rationality of the criminal law will have to go to school to the Code for a long time to come. Let us hope that the class is as large and as influential as it needs to be.

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31. For a penetrating critique see HART & HONORÉ, CAUSATION IN THE LAW 353-61 (1959).

32. See Bush v. Commonwealth, 78 Ky. 268 (1880), *rev'd on other grounds*, 107 U.S. 110 (1883).

33. MPC § 2.03(2)(b).

II.

It remains as true as the day it was written that "the major problems of the criminal law are two: what behavior should be made criminal, and what should be done with persons who commit crimes."[34] These are the problems with which the framers of the Model Penal Code have concerned themselves, perhaps to better advantage than any previous efforts that have been made. Is it the measure of their success that we should shift our attention from the substance of the criminal law to those recurring problems of procedure and administration that press so insistently for solution? It is undeniable that these are the problems on which research in the criminal law, the Code apart, has tended to focus in recent years. And those who have been so fruitfully pursuing such studies have been inclined to claim primacy for them. The statement of one of the leaders of this movement is not atypical: "The major task for the future is to give increased attention to . . . the process by which legislative policy is implemented administratively."[35] And again: "the unique and important contribution which legal research can make is to ask what role, if any, the rule of law ought to play at various stages in criminal justice administration."[36]

No one who is familiar with the range of problems engendered by the conduct of the police, of prosecutors, of judges and juries, and of correctional authorities would be inclined to question the importance of intensified study of the processes of criminal justice. The claim of primacy, however, seems to me overstated. The problems of administration are inseparable from the problem of what is or ought to be the substance of what is being administered. Indeed, the character of the processes of criminal justice is formed by the substantive tasks allotted to them. A criminal law that deals centrally with gross injuries to persons and property—as Anglo-American law traditionally did—requires very different institutional processes for its administration than does a criminal law that plays a role in every sphere of social policy in which government takes a hand, as Anglo-American criminal law has increasingly come to do in the last century or so. It is in the context of a given set of tasks allotted to the criminal law that we are forced to ask, for example, what powers of arrest and interrogation the police should possess. Decisions about the substance of the law are both logically and practically anterior to decisions about its processes. Yet there has been surprisingly little disposition among scholars in the field to give serious attention to the anterior problems of substance as they affect decisions about procedure.

The Code has dealt primarily with those forms of conduct that have been the traditional concern of the criminal law, conduct that "would be intolerable

34. MICHAEL & WECHSLER, CRIMINAL LAW AND ITS ADMINISTRATION 6 (1940).
35. Remington, *Criminal Justice Research*, 51 J. CRIM. L., C. & P.S. 7, 11 (1960).
36. *Ibid.*

in any society."[37] Only here and there in the Code has there been either disposition or need to ask whether conduct ought to be subjected to the criminal sanction. When that question has been asked, it is fair to say that the answer has given great weight to the existing behavior content of the criminal law. And it seems right that this should be so. In an enterprise of this sort, much is to be said for a prudential policy of first things first. The task of rationalizing the criminal law begins most profitably, as it begins in the Code, with forms of conduct about which, in their broad outline at least, there is intuitive agreement that the criminal sanction is an appropriate control device. But an enterprise so conceived and executed rarely has to confront basic questions about the criteria that ought to be relevant to a decision whether conduct should be made criminal.[38]

The submission of these brief and general remarks is that a major task for the future is to examine the limits of the criminal law, to inquire into the criteria that ought to be taken into account in reaching wise legislative determinations about the behavior content of the criminal law. We use the criminal law for as many different ends today as there are ends of social control. It is widely doubted that all of these uses are equally wise. But no one has attempted in any but the most general terms to suggest how decisions about the use of the criminal sanction should be made.

Research about the problems of administration tends to take the behavior content of the criminal law as given. The inquiry is into how existing institutions actually work. Solutions are advocated in the name of reality, so that the law on the books may be brought into closer conformity with what are thought to be the intractable facts of life about the law in action. But it must be obvious that, for example, the way the police behave in apprehending persons suspected of crime is bound to be affected by the ease or difficulty with which the police may discover whether a crime has in fact been committed, which in turn depends on the character of the conduct that has been denominated as criminal. Valuable empirical studies have recently pointed out that the principal burden of determining whether to hold for trial persons arrested for serious offenses falls, not on committing magistrates on whom prevalent legal dogma places it, but rather on the police and on prosecutors.[39] The author of one such study concludes that since the screening function does fall on the police, they should have the power to detain for investigation without

37. MICHAEL & WECHSLER, *op. cit. supra* note 34, at 12.

38. The principal exception is to be found in the discussion of whether consensual homosexual conduct between adults should be treated as criminal. See MPC § 207.5, comments (Tent. Draft No. 4, 1955), a model in miniature of useful discourse about the behavior content of the criminal law.

39. See Barrett, *Police Practices and the Law—From Arrest to Release or Charge*, 50 CALIF. L. REV. 11 (1962); Goldstein, *Police Discretion Not To Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543 (1960).

making an arrest.[40] He recognizes explicitly the following as one of the facts of life that determine the existing situation:

> Legislatures have created numerous crimes in which participation is consensual and there is no victim to complain. Laws against gambling, prostitution, sale and use of narcotics, and others throw full responsibility upon the police to discover the existence of the crime as well as the identity of the criminal.[41]

If one concedes *arguendo* that detention for investigation is a price that we must pay in order to have effective enforcement of laws relating to gambling and narcotics, surely rational lawmaking must determine whether the price is worth paying. Can it be seriously asserted that such questions have been answered? It is true that many areas of the criminal law concerned with matters such as these have received comparatively recent legislative attention. It is not true that they have undergone the disinterested scrutiny that legal scholarship can bring to bear. I was therefore surprised to read the reporter's note that concludes the part of the Code in which the various specific offenses are defined:

> (At this point, a State enacting a new Penal Code may insert additional Articles dealing with special topics such as narcotics, alcoholic beverages, gambling and offenses against tax and trade laws. *The Model Penal Code project did not extend to these, partly because a higher priority on limited time and resources was accorded to branches of the penal law which have not received close legislative scrutiny.* Also, in legislation dealing with narcotics, liquor, tax evasion, and the like, penal provisions have been so intermingled with regulatory and procedural provisions that the task of segregating one group from the other presents special difficulty for model legislation.)[42]

The conclusion not to deal with such offenses was doubtless a wise one, given the limits of the available resources and the demands of a prudential policy of first things first. But I should have preferred to see explicit recognition given to what must have been a controlling consideration: that the resources of legal scholarship have yet to be mobilized to deal in the large and in detail with questions about the criteria for invocation of the criminal sanction.

I do not, of course, urge a slackening of the interest in problems of administration that has so strongly characterized the renaissance of criminal law study in this country. Stimuli for that interest abound and are not likely to lessen. To mention one, there is the prominence accorded these problems by the Supreme Court's increasingly frequent consideration of their constitutional dimension. To mention another, there is the fact that empirical research

40. Barrett, *supra* note 39, at 53.
41. *Id.* at 20.
42. MPC at 241 ("Additional Articles"). (Emphasis added.)

into the administration of the criminal law is responsive to the article of the American creed which holds that if we will just heap high enough the mountains of fact, solutions will somehow emerge. I suggest only that the achievement of the Code should be viewed as a signal not to abandon the study of the substantive criminal law but to pursue it with renewed force on a higher level of analysis. The end of any great enterprise should also be a beginning.